JUL 5, 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

vs.

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES C. MARTIN,
Roanoke, Virginia,
Counsel for Petitioner.

FREDERICK L. ALLEN,
New York City,
MARTIN & ABBOTT,
Roanoke, Virginia,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Supreme Court of the United States:

The petition of The Mutual Life Insurance Company of New York, a corporation, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, respectfully shows to this Honorable Court:

A.

Statement of the Case.

On the 16th day of May, 1930, the petitioner issued to Benjamin F. Cooksey its contract of insurance for $4500.00, which contained the following disability clause, referred to in said contract as Section 3 (R. 87):

> "If, before attaining the age of sixty years and while no premium on this policy is in default, the insured shall furnish to the company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of the insured so long as such disability continues.
>
> "(b) Waiver of Premium—The company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability."

The premium due on November 16, 1931, was not paid, and the policy lapsed for non-payment of this premium. On or about December 14, 1931, which was during the grace period, the insured became totally and permanently disabled, and died on January 20, 1932. No proof of the disability suffered by the insured was furnished the Company, as required by the disability clause in the policy, during the lifetime of the insured, and the first notice the company received was proof of death made on January 27, 1932, after the death of the insured (R. 33). The Company refused payment of the policy because the same had lapsed for non-payment of the November 16, 1931, premium, and respondent brought this suit (R. 1). Upon a trial of the case the Judge of the District Court directed a verdict in favor of petitioner (R. 27) and respondent secured a reversal in the Circuit Court of Appeals for the Fourth Circuit at Richmond, upon the sole ground that the insured's

mental or physical disability, which rendered it impossible for the insured to make proof under the disability clause of the policy, excused him from furnishing such proof before default in payment of the premium (R. 98).

B.

The Question Presented.

The sole question presented in this case is whether insanity of the insured excused the failure to comply with an explicitly stipulated requirement of his life insurance policy to the effect that due proof of disability was a condition precedent to the waiver by the insurance company of the payment of premiums due on said policy.

C.

Rulings of the Court Below.

The District Court directed a verdict for the petitioner on the ground that under the decision in the case of *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 Sup. Ct. 230, receipt by the Company of due proof of disability was definitely made a condition precedent to an assumption by it of the payment of the premiums becoming due after the receipt of such proof and that where no such proof was furnished the policy lapsed for non-payment of the premium (R. 86).

The Circuit Court of Appeals admitted that the receipt by the Company of due proof of disability was definitely made a condition precedent to the waiver of the premiums becoming due after the receipt of such proof, but held that it was a question for the jury whether insured's alleged insanity made it impossible for him to furnish such proof and if they so found, the furnishing of such proof was waived.

D.

Reasons for Granting the Petition.

(1) The decision of the Circuit Court of Appeals below is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit on the same question in *Egan* v. *New York Life Insurance Company,* 67 Fed. 2d, 899. The question involved in the *Egan* case is the same question that is involved in the case at bar; and the holding in that case is directly contrary to the holding here complained of. In that case the action was to recover five annual disability payments of $1,000 apiece alleged to be due under a life insurance policy, brought by the committee of an insane insured, claim having first been made after the policy had lapsed for non-payment of premiums. The committee contended that the insanity of the insured which antedated the lapse of the policy rendered inoperative the policy provision requiring the furnishing of prompt proof of disability as a condition precedent to the waiver of premiums by the Company and excused the legal consequences of failure to perform this condition precedent. The Circuit Court of Appeals for the Fifth Circuit, however, decided that that contention was untenable, saying that under the *Bergholm* case the provision of the policy requiring prompt proof of disability is not to be considered waived or rendered inoperative simply because of misfortune overtaking the insured, but that the contract clearly contemplated that if for any reason the insured was unable to promptly make proof of his disability, some one else in interest must do so for him.

(2) The Circuit Court of Appeals below has disregarded contrary applicable decisions of this Court.

The Circuit Court of Appeals below has rested its holding on the proposition that impossibility of performance may excuse the performance of a condition precedent if

the existence of such condition *"is no material part of the exchange for the promisor's performance and the discharge of the promisor will operate as a forfeiture."* (Italics ours.) The holding that the furnishing of due proof of disability as provided in the policy here involved is no material part of the exchange for the performance of the promisor, to wit, the waiver of premiums, contravenes the time-honored holding of this Court that the condition in a policy of life insurance that the policy shall cease, if the stipulated premium shall not be paid on or before the day fixed for payment is of the very essence and substance of the contract against which even a Court of Equity cannot grant relief. *New York Life* v. *Statham, et al.,* 93 U. S. 24; *Klein* v. *Ins. Co.,* 104 U. S. 88; *Bergholm* v. *Peoria Life,* 284 U. S. 489.

The holding of the Circuit Court of Appeals here complained of, that "a mental or physical incapacity of the insured which rendered it impossible for him to make the proof" of disability, excused the legal consequence of failure to comply with (as stated in the opinion in the *Bergholm* case) "an explicitly stipulated requirement of the policy" which constituted a condition precedent to the waiver of the premium, ignores the established holding of this Court that, with respect to payment of insurance premiums, the doctrine that accident, inevitable necessity or the Act of God may excuse performance, has no existence. *New York Life* v. *Statham, supra; Klein* v. *Ins. Co., supra; Bergholm* v. *Peoria Life, supra.*

(3) The question involved herein is of sufficient general importance to warrant the consideration of this Honorable Court. The question involved is important as it affects the rights and interests of numerous holders of life insurance policies, not only of policies issued by the petitioner but of policies issued by other life insurance companies as well.

Where, heretofore, the petition for writ of certiorari to this Court in insurance cases showed that proper grounds existed, the writ has usually been granted. See *Bergholm* v. *Peoria Life*, 284 U. S. 489; and *Landress* v. *Phoenix Mutual Life Ins. Co. et al.*, No. 295, October Term, 1933.

Prayer for Writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fourth Circuit, at Richmond, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 3575, E. E. Johnson, Administrator of Benjamin F. Cooksey, deceased, Appellant, v. The Mutual Life Insurance Company of New York, Appellee, and that the said judgment of the said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper; and your petitioner will ever pray.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,
By JAMES C. MARTIN,
Roanoke, Virginia,
Counsel for Petitioner.

FREDERICK L. ALLEN,
New York City,
MARTIN & ABBOTT,
Roanoke, Virginia,
Counsel.

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, A CORPORATION,

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vs.

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fourth Circuit in this case is reported in E. E. Johnson, Administrator of Benjamin F. Cooksey, deceased, vs. The Mutual Life Insurance Company of New York, 70 F. (2d) 41 (R. 98).

II.

Jurisdiction.

(1) The date of the judgment to be reviewed is April 4, 1934 (R. 106). The petitioner filed motion for rehearing in the Circuit Court of Appeals (R. 107) and same was denied by the said court May 2, 1934 (R. 108).

(2) The jurisdiction of this Honorable Court is invoked under Sec. 347a of the Judicial Code, and Supreme Court Rule 38(5b).

(3) Cases believed to sustain the jurisdiction of this Court are the following:

Bergholm v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230;

Egan v. *New York Life Ins. Co.*, 67 F. (2d) 899;

New York Life Ins. Co. v. *Alexander*, 122 Miss. 813, 85 So. 93;

New England Mutual Life Ins. Co. v. *Reynolds*, 217 Ala. 307, 116 So. 151;

Hall v. *Acacia Mut. Life Ass'n* (Tenn. 1932) 46 S. W. (2d) 56;

Northwestern Mutual Life Ins. Co. v. *Dean*, 43 Ga. App. 67, 157 S. E. 878;

Smith v. *Missouri State Life Ins. Co.*, 134 Kan. 426, 7 P. (2d) 65;

Courson v. *New York Life Ins. Co.*, 295 Pa. 518, 145 A. 530;

Reynolds v. *Traveler's Ins. Co.* (Wash. 1934) 28 P. (2d) 310;

Iannarelli v. *Kansas City Life Ins. Co.* (W. Va. 1933) 171 S. E. 748.

III.

Statement of the Case.

This has already been stated in the preceding petition under A (p. 2 *et seq.*), which is hereby adopted and made a part of this brief.

IV.

Specification of Error.

The undisputed evidence shows that the insured did not become totally and permanently disabled within the intent and meaning of policy until after default in the payment of the premium due November 16, 1931, and that the insured did not become disabled until after December 14, 1931, which was during the days of grace, if then, as he was able to execute an extension note with reference to another policy on January 8, 1932 (R. 44). The Circuit Court of Appeals erred in reversing the judgment of the trial court and in holding that the insured was excused from furnishing proof of his disability under the disability clause of the policy, if prior to default in payment of the premiums, he was mentally or physically incapable of furnishing the proof, instead of holding that the furnishing of proof of the disability was a condition precedent to waiver of premium, whether the insured be mentally capable or incapable.

V.

ARGUMENT.

The only legal question involved is whether or not mental incapacity or insanity of the insured to entitle him to waiver of premiums in the disability clause in question excuses him from furnishing due proof of his disability to the company before default in payment of the premiums.

The Circuit Court of Appeals below held that if the insured be sane, the furnishing of due proof is a condition precedent, but if he be insane or mentally incapacitated, then he is allowed a reasonable time thereafter to furnish proof —hence a condition subsequent. The petitioner asserts that the disability clause in question is not open to this construction—that the condition with reference to furnishing proof must be a condition precedent or subsequent, regardless of the mental capacity of the insured; that in this case it is a condition precedent, even though the insured be insane or mentally unable to personally furnish the required proof, and the company is not bound to waive the premiums thereunder until the required proof is received.

In *Bergholm* v. *Peoria Life Insurance Co.*, 284 U. S. 489, 492, 52 S. Ct. 230, 231, this Court held in a similar policy that the disability clause was free from ambiguity; that the construction of the disability clause was reasonable and just; and added:

> "but it furnished no warrant for avoiding hard consequences by imparting into a contract an ambiguity which otherwise would not exist, or under the guise of construction, by forcing from plain words unusual and unnatural meanings."

The Circuit Court below did this, contrary to the decision of this Court. This Court further held in the same case that:

> "to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief, by the insurer, would be to vary the plain terms of a contract in utter disregard of long-settled principles."

The court below utterly disregarded the terms of the contract, and imparted into the contract an ambiguity which otherwise does not exist, and "under the guise of construction" has forced from "plain words" unusual and unnatural meanings.

The decision below is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit, in the case of *Egan* v. *New York Life Ins. Co.*, 67 F. (2d) 899. The policy in that case is identical with the one now before the Court, and in construing the policy the Court for the Fifth Circuit held that:

> "Insanity and consequent inability of the insured to personally furnish proof of his disability did not excuse him, since the furnishing of proof was made a condition precedent to waiver of premiums by the terms of the policy, the terms of which are plain and unambiguous."

The court below failed to follow the rulings of the Supreme Court applicable to the same situation, namely, that which respects the prompt payment of premiums. The rule is laid down clearly in the cases of *New York Life Ins. Co.* v. *Stratham*, 93 U. S. 24, 23, L. Ed. 789; *Klein* v. *New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662; *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230. The *Stratham* case held that time of payment of premiums is material and of the essence of the contract. "Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here." The *Klein* case held that insanity did not excuse the payment of premiums when due. In the *Bergholm* case this Court held that the provision in the policy respecting the giving of notice of disability, in order to have payment of the premium waived, had to be strictly complied with, and was governed by the same principle that governs the payment of premiums as they become due.

As insanity does not excuse the payment of premiums when due (*Klein* v. *New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662), it should not excuse the furnishing of due proof for waiver of premiums in event of disability. *Reynolds* v. *Traveler's Ins. Co.* (Wash.), 28 P. (2d) 310; *Iannarelli* v. *Kansas City Life Ins. Co.* (W. Va.), 171 S. E. 748; *New England Mut. Life Ins. Co.* v. *Reynolds*, 217 Ala. 307, 116 So. 151.

The decision of the court below is contrary to and in conflict with the weight of authorities as shown by the following:

New England Mutual Life Ins. Co. v. *Reynolds*, 217 Ala. 307, 116 So. 151;

New York Life Ins. Co. v. *Alexander*, 122 Miss. 813, 85 So. 93;

Northwestern Life Ins. Co. v. *Dean*, 43 Ga. App. 67, 157 S. E. 878;

Berry v. *Lamar Life Ins. Co.* (Miss.), 142 So. 445;

Hall v. *Acacia Mut. Life Ass'n* (Tenn.), 46 S. W. (2d) 56;

Wolfe v. *Mutual Life Ins. Co.*, 3 Tenn. App. 199;

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Bloss v. *Equitable Life Assur. Soc. of U. S.* (Wash.), 28 P. (2d) 303;

Reynolds v. *Traveler's Ins. Co.* (Wash.), 28 P. (2d) 310.

The decisions referred to disclose that the modern forms of life insurance usually contain the disability clause in question. That its construction is of great importance

and of public interest is obvious. Therefore it is respectfully submitted that, because there are two lines of decisions on the question of construction of the clause, there should be a uniform rule of construction among the Federal courts upon a question of such vital importance to the welfare of the public, and this Honorable Court should require this case certified to it for review. Sec. 347a, Judicial Code; Rule 38(5b), Supreme Court Rules; *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230.

All the cases cited are in point with the position of the petitioner asserted in the petition and this brief, and they hold that the furnishing of proof of disability under a disability clause, similar to the one in this case, is a condition precedent to waiver of premiums, and such proof is not excused by the insanity or mental incapacity of the insured.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the judgment of the Circuit Court of Appeals for the Fourth Circuit may be reviewed, and that for such purpose Petitioner prays that writ of certiorari issue to said court and on final hearing the judgment of said court be reversed and the judgment of the trial court affirmed.

JAMES C. MARTIN,
Roanoke, Virginia,
Attorney for Petitioner.

FREDERICK L. ALLEN,
New York City,
MARTIN & ABBOTT,
Roanoke, Virginia,
Attorneys for Petitioner.